Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIAM C. WARDLAW,

Petitioner,

v.

WILLIAM R. PICKETT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I

Where (1) a U.S. Deputy Marshal drags down courthouse stairs and repeatedly kicks and punches a limp, nonthreatening person in his custody; (2) an intervenor not in custody, acting well within common law privilege, rapidly approaches and says "Don't hurt him please, he is totally nonviolent"; (3) the Deputy wheels and punches the intervenor in the jaw, knocking him down, then punches him repeatedly thereafter, is the Deputy liable to the intervenor under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)?

II

Where an accompanying Deputy makes no effort to stop his colleague from dragging downstairs, punching, and kicking the initial victim, is he liable under *Bivens* for the subsequent punching of the intervenor?

III

Where the Deputies then arrest the intervenor and procure his pretrial detention, indictment, and prosecution--by falsely swearing he struck one of the Deputies from behind as they properly carried the limp person down the stairs--are the Deputies, upon the intervenor's acquittal, liable to him under the Fourth and Fifth Amendments for false arrest and malicious prosecution?

PARTIES BELOW

The parties to the proceeding in the U.S. Court of Appeals for the District of Columbia Circuit were William C. Wardlaw, plaintiff-appellant, and William R. Pickett and Albert M. Crew, defendants-appellees.

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II. The decision below holding Marshal Crew not liable for failing to restrain Marshal Pickett conflicts with *O'Neill v. Krzeminski*, 839 F.2d 9 (2d Cir. 1988), several other federal appellate decisions, and the traditional causation standard adopted in *Monroe v. Pape*, 365 U.S. 167 (1961). 17

III. The decision below that the marshals had, or reasonably believed they had, probable cause to arrest and prosecute Mr. Wardlaw is contrary to established law recognizing that privileged intervenors are free of criminal liability. 19

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William C. Wardlaw petitions this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which answered no to each of the questions presented.

OPINIONS BELOW

The opinion delivered by the United States Court of Appeals for the District of Columbia Circuit appears in petitioner's appendix ("App.") at 1a-16a and is reported at 1 F.3d 1297. The December 12, 1990 Memorandum of the United States District Court for the District of Columbia is unreported and appears at App. 17a-26a. The district court's unreported February 22, 1991 Memorandum-Order appears at App. 28a-29a.

JURISDICTION

The judgment of the court of appeals was entered September 10, 1993. Rehearing was denied December 6, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V (excerpt)

No person shall . . . be deprived of . . . liberty . . . without due process of law.

STATEMENT OF THE CASE

Facts

The undisputed events, and sworn, eyewitness testimony stating Mr. Wardlaw's version of the disputed events, are as follows.[1] On June 7, 1988, John Heid and Mr. Wardlaw attended a district court hearing. They sat on the benches for the public. Mr. Heid did not stand when the judge entered and left the courtroom. Deputy Marshal Donald Horton told Mr. Heid to stand, but Mr. Heid said that he stood for no one but God. Marshal Horton told Mr. Heid to leave the courtroom. Mr. Heid refused, saying he would leave only if carried out. Marshal Horton and Marshal Crew grabbed Mr. Heid and Mr. Heid went limp. App. 17a-18a.

The marshals dragged Mr. Heid to the courtroom door. Just inside the door Marshal Horton ordered Marshal Crew and Marshal Pickett to remove Mr. Heid from the courthouse. After Marshals Pickett and Crew dragged Mr. Heid out of the courtroom, Mr. Wardlaw left the courtroom and followed the marshals. They rapidly dragged Mr. Heid down the hall. Mr. Heid was passive. The marshals' facial expressions and demeanor revealed they were quite angry.

In the stairwell, Marshal Pickett, with Marshal Crew hanging on, rapidly dragged Mr. Heid *on his back* down the

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[1] Facts stated in Mr. Wardlaw's sworn, eyewitness testimony, but omitted from the opinion of the Court of Appeals, are printed in italics.

stairs, like a "sack of potatoes," *affording no protection for his head. Mr. Heid had to hold his head up to avoid hitting it on the stairs. At least one of the officers spat on him. Mr. Heid was unresisting and completely passive.* Verified Complaint, ¶¶9,10,13; Plaintiff's Exhibit A (Wardlaw testimony) at 15-23; Plaintiff's Exhibit B (Heid testimony) at 49-52,82; Plaintiff's Exhibit E (Heid Declaration), ¶¶4,6,7.

Mr. Wardlaw entered the stairwell. He saw the marshals dragging Mr. Heid down the stairs. Verified Complaint, ¶14; Wardlaw testimony at 23. Mr. Wardlaw rapidly descended the stairway, saying, "Don't hurt him please. He is totally nonviolent." Verified Complaint, ¶¶14, 17; Wardlaw testimony, at 23-27.

As Mr. Wardlaw began to speak, Marshal Pickett reached the stairwell landing and immediately kicked and punched Mr. Heid *in the face, causing blood to gush from his mouth and his glasses to be knocked to the floor. Mr. Heid remained passive and merely attempted to cover himself.* Verified Complaint,¶¶14, 15; Wardlaw testimony, at 26, 31-32; Heid testimony, at 53; Heid Declaration, ¶¶8, 10.[2]

Mr. Wardlaw approached the landing, his eyes directed to the last step. Verified Complaint, ¶17; Wardlaw testimony, at 32. Marshal Pickett wheeled and punched Mr. Wardlaw in the jaw, *knocking him to the stairs.* Verified Complaint, ¶18; Wardlaw testimony, at 32-34. *While Mr. Wardlaw lay there unresisting, covering his face and bending up his legs,* Marshal Pickett punched Mr. Wardlaw two or three more

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[2] The force used against Mr. Heid was likely to cause death or serious bodily injury. *State v. Gardner*, 522 S.W.2d 323 (Mo. 1975) (assault with fists may be force likely to produce death or great bodily harm); *People v. McCaffrey*, 258 P. 2d 557 (Cal. App. 1953) (same; punch with fist or kick with shoe).

times in the chest and shoulder. Verified Complaint, ¶18; Wardlaw testimony, at 32-34.[3]

Mr. Heid then attempted to move. He intended to place himself between Marshal Pickett and Mr. Wardlaw and to cover Mr. Wardlaw. Mr. Heid, however, was unable to do so because of the restraining grasp of Marshal Crew. Heid testimony at 54-55; Heid Declaration, ¶10.

Mr. Heid told Mr. Wardlaw to "get their names." Marshal Pickett then said to Marshal Crew "we better charge them with assault." Verified Complaint, ¶20; Wardlaw testimony, at 37.

The marshals arrested Mr. Heid and Mr. Wardlaw. Marshal Crew swore falsely that Mr. Wardlaw had grabbed Marshal Pickett while the marshals were properly carrying Mr. Heid down the stairs. He also swore falsely that Mr. Heid dove at and struck Marshal Pickett's back while Marshal Pickett was fending off Mr. Wardlaw's assault. Based on this false account, Mr. Heid and Mr. Wardlaw were indicted. Mr.

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[3] Mr. Wardlaw's sworn declaration (included in Docket Entry 56) described his injuries as follows:

> During the first few hours after Pickett's attack . . . my jaw was extremely painful--to the point where I could barely move it. . . . During the first 48 hours after the attack I ate nothing whatsoever and drank only water; this was due not only to the pain in my jaw but also to the mental and emotional stress. . . . [P]ain in my chest . . . [became] severe . . . [and] . . .[t]here was also a very painful spot on my left shoulder . . . the day after the attack. . . . The pain gradually diminished over a period of many weeks.

Wardlaw was jailed, then released pending trial. At the criminal trial both Marshal Crew and Marshal Pickett repeated Marshal Crew's story. Mr. Wardlaw and Mr. Heid testified as stated above. The jury acquitted Mr. Wardlaw, but convicted Mr. Heid. *United States v. Heid*, 904 F.2d 69 (D.C. Cir. 1990).[4]

District Court Proceedings

Invoking the district court's federal question jurisdiction, 28 U.S.C. § 1331, Mr. Wardlaw filed a *Bivens* action[5] against Marshals Pickett and Crew. He sued them for unreasonable seizure in violation of the Fourth Amendment (punching with fists and false arrest). He also sued them for malicious prosecution in violation of the Due Process Clause of the Fifth Amendment.[6]

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[4] Interviews of the jurors revealed they convicted Mr. Heid solely for his unsuccessful attempt on the stairwell landing to move out of Marshal Crew's grasp--an attempt he admitted he had made in an effort to shield Mr. Wardlaw from Marshal Pickett's blows. As to disputed matters, the jury believed Mr. Wardlaw and Mr. Heid, not Marshal Crew and Marshal Pickett. Hence the acquittal of Mr. Wardlaw. Exhibit 1, Motion for a New Trial, *United States v. Heid*, Crim. No. 88-249 OG (U.S. D. Ct. D.C. September 28, 1988).

[5] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (Constitution provides cause of action for damages against federal officers for violation of the Fourth Amendment). *Davis v. Passman*, 442 U.S. 228 (1979) (same; Fifth Amendment).

[6] Mr. Wardlaw initially sued the United States as well, under the Federal Tort Claims Act. When the defendants' moved for summary judgment, the district court granted the marshals'

The district court held Marshals Pickett and Crew qualifiedly immune from suit for Marshal Pickett's punching of Mr. Wardlaw. The court said it reached this conclusion because Mr. Wardlaw "admittedly shouted at Pickett and Crew as they attempted to carry off John Heid, thereby indicating some level of provocation" and because Mr. Wardlaw's injuries "were limited." App. 25a. On Mr. Wardlaw's motion for reconsideration, the court ruled that Mr. Wardlaw "had no privilege to intervene in the arrest of Heid." App. 29a.[7]

The district court also rejected Mr. Wardlaw's false arrest and malicious prosecution claims. The court said "there is simply no evidence of malice or bad faith on the part of the marshals" and "under the circumstances there certainly appears to have been probable cause to arrest Wardlaw and Heid for their role in the disruption." App. 23a.

Mr. Wardlaw's reconsideration motion argued his evidence showed that (1) all of Mr. Heid's and Mr. Wardlaw's actions in the stairway were well within their privileges to defend themselves and each other; (2) Marshal Pickett, not Mr. Heid or Mr. Wardlaw, committed criminal assaults and constitutional torts; and (3) the marshals, obviously aware of their liability, conspired falsely to charge Mr. Heid and Mr. Wardlaw with assault in order both to protect Marshal Pickett from criminal liability and to thwart the expected civil suit by

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motion but denied that of the United States. App. 27a. Since proceeding against the United States alone would not afford a jury trial, Mr. Wardlaw dismissed his claims against the United States and appealed the orders granting summary judgment to the marshals.

[7] Mr. Heid, however, was not under arrest when Mr. Wardlaw intervened.

his victims. The court denied reconsideration, saying these arguments previously had been rejected. App. 28a.

Argument and Decision on Appeal

Marshal Pickett's Liability for Punching Mr. Wardlaw

On appeal, Mr. Wardlaw presented the same arguments he made in the district court. He also cited additional precedents. He pointed out, Brief for Appellant at 20-21, that in *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991), the court faced a 1987 event indistinguishable from that here and held police officers liable under the Fourth Amendment for unlawful force against an intervenor. In *Dixon*, police stopped a husband and wife. Without provocation, an officer kicked the husband and hit him in the stomach with a flashlight. Officers then beat him further. The wife screamed into an officer's ear, "Don't hurt my husband. He didn't do anything wrong." The officer then pushed her to the ground, stepped on her leg, and twisted one of her hands behind her. *Id.* at 1458. The court held the force used against both the husband and the wife was objectively unreasonable and that no officer reasonably could have believed otherwise. *Id.* at 1463.

Mr. Wardlaw argued the same conclusion was required in his case. Developing his argument, Mr. Wardlaw said that he was privileged to intervene because Marshal Pickett's attack on Mr. Heid was objectively unreasonable.[8] Brief for Appellant at 11-14. Mr. Wardlaw cited criminal and tort cases, tort treatises, and the *Restatement (Second) of Torts*

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[8] Objectively unreasonable force by a police officer violates the Fourth Amendment prohibition against unreasonable seizure. *Graham v. Connor*, 490 U.S. 386 (1989); *Martin v. Malhoyt*, 830 F.2d 237, 261 (D.C. Cir. 1987).

(1965)--all recognizing the intervenor's privilege. Brief for Appellant at 13-14. Petition for Rehearing at 2-3, 9-10.

Mr. Wardlaw argued that common law regarding defense of another is traditional tort defense law incorporated into the law of constitutional torts by *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). Brief for Appellant at 13-14; Petition for Rehearing at 2, 10. Mr. Wardlaw then cited tort cases and *Restatement* provisions holding an attacker, including a police officer, liable for beating a privileged intervenor. Petition for Rehearing at 2, 9.

Mr. Wardlaw also drew support from the law of self-defense. He cited cases holding an attacker liable for blows inflicted after the attack victim resorts to privileged self-defense. Petition for Rehearing at 3. He noted, Brief for Appellant at 14, that self-defense law had been incorporated into constitutional tort law by *Graham v. Davis*, 880 F.2d 1414, 1418-1419 (D.C. Cir. 1989) (constitutional tort law includes common law of self-defense and defense of mutual consent, citing *Imbler*, two state cases, a treatise, and the *Restatement*). Mr. Wardlaw argued that if self-defense law is part of constitutional tort law, then law on defense of another is incorporated as well, since privileged intervenors who aid attack victims stand in the shoes of the victims, and do no more than what the victims themselves are privileged to do. Petition for Rehearing at 3, citing § 76 of the *Restatement*. Mr. Wardlaw therefore argued he was entitled to trial of his Fourth Amendment beating claim against Marshal Pickett.

The Court of Appeals, however, held Marshal Pickett entitled to summary judgment. In so holding, the court never addressed Mr. Wardlaw's contention that the facts of *Dixon v. Richer* are indistinguishable.

The court's principal holding found Marshal Pickett entitled to summary judgment *even if* Mr. Wardlaw acted within the common law privilege to intervene. The court said "the privilege to intervene has *uniformly* been recognized as a shield, not a sword." App. 9a. (Emphasis in original.) It "merely shields the intervenor from criminal and civil liability" and does not "impose liability on an officer who . . . uses excessive force against the intervenor." *Id.* at 15a.

To support this statement, however, the court cited only criminal cases in which liability of attackers to privileged intervenors was not at issue. The court overlooked tort cases entirely. In tort cases, attackers have been held liable for beating privileged intervenors who aid the attackers' victims. *Gortarez v. Smitty's Super Valu, Inc.*, 680 P.2d 807, 811, 814-816 (Ariz. 1984) (*En Banc*) (store detective who in excess of privilege grabbed and pushed suspected shoplifter liable for grabbing and choking intervenor who yelled at, ran up to, and pushed detective); *Rogers v. Huber*, 239 So.2d 333 (Miss. 1970) (attacker liable for punching privileged intervenor). The court also overlooked the *Restatement* sections which expressly say attackers, including police officers, are liable for beating privileged intervenors. *Restatement (Second) of Torts* §§ 63, 65, 76, 72, 13, 10, 71, 117, 121, 132, 133 (1965). The court never addressed self-defense cases holding attackers liable for blows inflicted after attack victims defend themselves. *Juarez-Martinez v. Deans*, 424 S.E.2d 154, 158-159 (N.C. 1993); *Nordmann v. International Follies, Inc.*, 250 S.E. 2d 794, 796-797 (Ga. 1978); *Jelly v. Dabney*, 581 P.2d 622, 624-625 (Wyo. 1978). The court did not mention its own decision on this point, *Graham v. Davis*, 880 F.2d 1414 (D.C. Cir. 1989).

Having determined that, in "assess[ing] a law enforcement officer's liability" to an intervenor, no consideration should be given to whether the intervenor's conduct was privileged,

App. 9a, the Court of Appeals then assessed whether Marshal Pickett's punching of Mr. Wardlaw was objectively reasonable under *Graham v. Connor*, 490 U.S. 386 (1989). The court held itself bound to "consider all of the facts" presented by "Wardlaw's account of events," App. 12a, but the court then omitted both Marshal Pickett's dragging downstairs of Mr. Heid, as well as Marshal Pickett's subsequent bloody punching and kicking of Mr. Heid's head on the stairway landing. Instead, the court said the marshals merely were "moving an uncooperative individual," and that Mr. Wardlaw "shouted at the deputies as he approached them, . . . reasonably raising a fear that he was about to attack." App. 12a. Thus, on the incorrect assumption that Marshal Pickett was innocent of any wrongdoing before Mr. Wardlaw shouted and approached, the Court held Marshal Pickett's punching of Mr. Wardlaw objectively reasonable.[9]

Marshal Crew's Liability for the Punches

Mr. Wardlaw cited to the Court of Appeals numerous cases defining the duty of police officers to protect the public from other officers' unconstitutional force. Brief for Appellant at 21; Petition for Rehearing at 6-7, citing, *inter alia*, *O'Neill v. Krzeminski*, 839 F.2d 9, 11-12 (2d Cir. January 29, 1988);

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[9] The Court of Appeals then misstated Mr. Wardlaw's evidence of the events after Marshal Pickett's punch to Mr. Wardlaw's jaw. The court said, "Pickett hit him . . . three or four times . . . in rapid succession . . .Wardlaw sat down . . . and . . . Pickett did not hit him [further]." App. 12a. Mr. Wardlaw's evidence, however, said "Marshal Pickett . . . punched Mr. Wardlaw in the jaw, knocking him to the stairs. While Mr. Wardlaw lay there unresisting, covering his face and bending up his legs, Marshal Pickett punched Mr. Wardlaw two or three more times in the chest and shoulder." Verified Complaint, ¶18; Wardlaw testimony, at 32-34.

Fundiller v. City of Cooper City, 777 F.2d 1436, 1441-1442 (11th Cir. 1985); *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983). Under these decisions, police officers have a duty to act to restrain officers who attack persons unlawfully. The duty to restrain an attacker, once arisen, is owed to all of the attacker's foreseeable victims. *See* W. Prosser, *Law of Torts* (4th ed. 1971) at 175 (person having a duty to restrain another from foreseeable criminal conduct owes that duty "to anyone who may be injured" by breach of the duty).

Mr. Wardlaw argued that Marshal Crew had ample opportunity to restrain Marshal Pickett before the latter wheeled and punched Mr. Wardlaw in the jaw. Brief for Appellant at 21-22. According to the evidence presented, Marshal Crew, hanging onto Mr. Heid, was aware of the stairway dragging before Mr. Wardlaw saw it. Mr. Wardlaw was able to speak and move in response to this objectively unreasonable violence even before Marshal Pickett began kicking and punching. Marshal Crew had more time than Mr. Wardlaw to appreciate what was happening, yet Marshal Crew did not even ask Marshal Pickett to stop. On the landing, Marshal Pickett kicked Mr. Heid, then bent over him and started punching. Having seen the kick, Marshal Crew did nothing to stop the subsequent bending over and repeated punching, though it took place within his reach. It was after this that Marshal Pickett then turned and attacked Mr. Wardlaw. Under the cases cited above, Marshal Crew's failure to take any action to restrain Marshal Pickett was a contributing cause of Mr. Wardlaw's injuries, rendering Marshal Crew jointly liable with Marshal Pickett.

The Court of Appeals, however, held that a police officer is not liable for failing to restrain an unlawfully attacking colleague unless it is certain that intervention by the officer would have been successful. The court held Marshal Crew entitled to summary judgment because "[e]ven if [he] had

attempted to intervene, he *might* not have succeeded." App. 13a. (Emphasis added.) The court cited no authority to support this holding.

False Arrest and Malicious Prosecution

The Court of Appeals rejected Mr. Wardlaw's false arrest and malicious prosecution claims solely on the ground that the marshals had, or at least reasonably believed they had, probable cause to arrest and prosecute. App. 13a-14a. In reaching this conclusion, the Court of Appeals once again disregarded Marshal Pickett's dragging downstairs, kicking, and punching of Mr. Heid. Instead, the court said merely "the deputies were . . . fully occupied with attempting to remove a limp and uncooperative Heid [and] Wardlaw's actions could have reasonably made him appear to be an aggressor." App. 14a.

The court ignored that, according to Mr. Wardlaw's evidence, the marshals knew full well that Marshal Pickett was the aggressor, that Mr. Wardlaw was a privileged intervenor, and that under the court's own analysis, privileged intervenors are free of criminal liability. The court did not acknowledge that, according Mr. Wardlaw's evidence, the marshals lied about what happened.

REASONS FOR GRANTING THE WRIT

I

The lower court's rejection of Mr. Wardlaw's beating claim against Marshal Pickett conflicts with *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991), and is incompatible with well-settled law on defense of another, incorporated in constitutional tort law by *Imbler v. Pachtman*, 424 U.S. 409 (1976).

On indistinguishable facts, the Tenth Circuit and the court below reached conflicting legal conclusions on an important question of constitutional tort law--whether a police officer who unlawfully attacks a person is liable under the Fourth Amendment for striking an intervenor who comes near and shouts at the officer to cease the attack. This Court should resolve this conflict by sustaining the Tenth Circuit's decision in *Dixon v. Richer*, 922 F.2d 1463 (10th Cir. 1991), which held the officer liable to the intervenor.[10]

The court below erroneously held that in assessing an officer's liability to an intervenor it is irrelevant whether the officer was engaged in an unlawful attack, or whether the intervenor's conduct was privileged. App. 9a, 12a-13a. As we demonstrated at page 9 above, traditional tort law on defense of another holds attackers liable for striking privileged intervenors who aid the attackers' victims. The assertion by the Court of Appeals that courts uniformly have held to the contrary, App. 9a, is wrong.

The *Restatement (Second) of Torts* (1965) expressly sets forth the traditional principles which render attackers liable to

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[10] The facts in *Dixon* are stated at page 7.

intervenors who aid the attackers' victims.[11] Under §§ 133, 63, and 65, those who are attacked by unprivileged force are privileged to defend themselves. Under § 76, an intervenor is "privileged to defend a third person . . . under the same conditions and by the same means as those under and by which he is privileged to defend himself." Under § 72, an attacker "is not privileged to defend himself against any force . . . which [a victim or an intervenor] is privileged . . . to inflict upon the" attacker. Under §§ 10, 13, 71, 117, and 133, an attacker is liable for all intentional, harmful, unprivileged force.[12]

These principles are not controversial. *Gortarez*, *supra*, citing the *Restatement* and W. Prosser, *Law of Torts* § 20 (4th edition 1971); *Rogers*, *supra*, citing the *Restatement*; *see* W. Keeton, *et al.*, *Prosser and Keeton on The Law of Torts* §§ 16, 19, 20 (5th ed. 1984) (discussing privilege, self-defense,

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[11] The *Restatement* applies to all "actors," including police officers. Sections 121 and 132 expressly state that excessive force by a police officer is not privileged.

[12] The opinion below erroneously addressed the "degree of force" used by Marshal Pickett, as reflected by the extent of Mr. Wardlaw's injuries. App. 12a, n.7. Marshal Pickett's punching of Mr. Wardlaw, however, was unlawful because under § 72 he had no privilege to use *any* force against Mr. Wardlaw. Where no force is justified, a punch is excessive. *Norris v. District of Columbia*, 737 F.2d 1148, 1151-1152 (D.C. Cir. 1984). Any resulting injury is compensable. *Gray v. Spillman*, 925 F.2d 90 (4th Cir. 1991) (where force is unjustified, beating is actionable, even without proof of physical injury). *See also Hudson v. McMillian*, 112 S. Ct. 995 (1992) (Eighth Amendment beating claim does not require proof of "significant injury").

and defense of others); F. Harper, *et al.*, *The Law of Torts* §§ 3.11, 3.12 (1986) (self-defense and defense of third persons). Self-defense and defense of others are well-settled tort defenses. *Imbler v. Pachtman*, 424 U.S. 409, 424, n. 21 (1976) (common law rule held well-settled, based on two state court cases, three lower federal court decisions, the *Restatement*, and a treatise). Constitutional tort law should conform to "well-settled common law" establishing "general principles of tort immunities and defenses." *Id.* at 418, 424. [13]

Liability stemming from the privileges of self-defense and defense of others is fully consistent with the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989), which governs Fourth Amendment excessive force cases. Contrary to the opinion below, App. 9a, incorporation of self-defense and defense of others in constitutional tort law does not "create a [new] framework for excessive force claims."[14] Further, the lower court's assertion, App 9a, that "using the [intervenor's] privilege to assess a law enforcement officer's liability would . . . place[] unrealistic and unjustifiable

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[13] Contrary to the concern expressed below, moreover, App. 9a, the incorporation of well-settled tort defense principles carries no implication that all "vagaries of the common law" are part of the Constitution.

[14] The Court of Appeals incorrectly believed that liability of an attacker for striking a privileged intervenor assumes the intervenor's privilege is a "sword" as well as a "shield." App. 9a. The "sword" in these instances, however, is not the intervenor's privilege *per se*, but simply the fundamental principle that the attacker's intentional, harmful force against the intervenor--like anyone's harmful, intentional force against another--is a battery, *unless* it is privileged. *Restatement* §§ 10, 13, 117.

burdens on the officer" is incorrect. Liability of an attacking officer to an intervenor arises only after the officer already has used objectively unreasonable force against the victim, in breach of constitutional duty. To avoid liability to intervenors, officers need only refrain from using unreasonable force in the first place.

As this Court recognized in *Graham v. Connor*, it is not "unrealistic and unjustifiable" to demand that officers refrain from attacking passive, nonthreatening persons. Once an officer uses objectively unreasonable force, moreover, it is not unjust to hold the officer liable for subsequent, naturally-resulting injuries which the officer intentionally and personally inflicts on persons who have done no wrong. In *Monroe v. Pape*, 365 U.S. 167, 187 (1961), the Court held that constitutional tort cases are governed by the traditional tort principle which deems defendants liable for the natural consequences of their actions. Mr. Wardlaw's intervention was a natural consequence of Marshal Pickett's attack on Mr. Heid, since it was privileged in law, and a matter of common decency.

The Court of Appeals said Marshal Pickett should not be held liable to Mr. Wardlaw, even if Mr. Wardlaw's conduct was privileged, because police officers should not be burdened with responsibility for properly making several "split-second" decisions. App. 10a. But where an officer initiates a lawless, brutal attack, the victim and others present are forced to make "split-second" decisions, and the law holds *them* accountable for any unreasonable defensive force they use. *Restatement* § 71. Contrary to the opinion below, App. 9a-10a, there is no justification for placing police officers above the law where their own unlawful aggression imposes a series of split-second decisions on themselves and innocent others.

In *Graham v. Davis*, 880 F.2d 1414 (D.C. Cir. 1989), the court did not eliminate the law of self-defense merely because the facts involved a rapid, complex sequence of many blows by several different actors, with each event placing a "number of decisions" before the party encountering it. The law of self-defense appropriately governed that constitutional tort case, and the law of privileged intervention properly applies here.[15]

Dixon v. Richer, *supra*, reflects the consistency between the Fourth Amendment test of objective reasonableness and the common law principle holding an attacker liable to an intervenor who properly aids the attacker's victim. The Court should approve *Dixon* and reject the contrary decision below.

II

The decision below holding Marshal Crew not liable for failing to restrain Marshal Pickett conflicts with *O'Neill v. Krzeminski*, 839 F.2d 9 (2d Cir. 1988), several other federal appellate decisions, and the traditional causation standard adopted in *Monroe v. Pape*, 365 U.S. 167 (1961).

The facts and case law cited in our Statement of the Case, *supra* at 10-11, establish that Marshal Crew had both a duty and ample opportunity to restrain Marshal Pickett before the latter wheeled and punched Mr. Wardlaw. Under the cited precedents Marshal Crew is liable for the blows inflicted by

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[15] To justify its contrary conclusion, the court below erroneously asserted that intervenors who help victims of unlawful police brutality *always* "heighten the danger" to those they seek to aid. App. 10a. The facts here belie this assertion. Mr. Wardlaw's intervention stopped Marshal Pickett's brutal, deadly attack on Mr. Heid's head. Mr. Wardlaw did what Marshal Crew should have done, and he succeeded in protecting Mr. Heid from further injury.

Marshal Pickett. The summary judgment granted Marshal Crew is incompatible with these decisions.

The Court of Appeals, moreover, adopted a legal standard which would preclude any officer from ever being held liable for breach of the duty to restrain an attacking colleague. The court held Marshal Crew entitled to summary judgment because "[e]ven if [he] had attempted to intervene, he *might* not have succeeded." App. 13a. (Emphasis added.) The same could be said in any case. It is always possible that an officer's effort to protect an attack victim might fail.

The Court of Appeals cited no authority to support the standard it adopted. This standard is erroneous. Normal principles of tort liability apply in constitutional tort cases. Defendants are liable for the foreseeable consequences of their breaches of duty. *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Proof of causal certainty is not required. To establish Marshal Crew's liability, Mr. Wardlaw was required only to present evidence warranting a reasonable inference that Marshal Crew's breach of duty to restrain Marshal Pickett was a proximate cause of Mr. Wardlaw's subsequent injury. *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. January 29, 1988). Mr. Wardlaw's evidence met this burden. His evidence shows that Marshal Crew made no effort to stop Marshal Pickett, though he was aware of the unlawful attack on Mr. Heid, was within arm's reach of Marshal Pickett, and was fully capable of restraining him before he wheeled and punched Mr. Wardlaw. *Id.*

The Court should reject the erroneous decision below and approve the holdings in *O'Neill* and the other cases cited above, which correctly apply the traditional causation standard embraced in *Monroe v. Pape*.

III

The decision below that the marshals had, or reasonably believed they had, probable cause to arrest and prosecute Mr. Wardlaw is contrary to established law recognizing that privileged intervenors are free of criminal liability.

The marshals, who were the arresting officers, were eyewitnesses to the stairway incidents. According to Mr. Wardlaw's evidence, both marshals knew that Marshal Pickett attacked Mr. Heid by dragging him down the stairs and kicking and punching his head. Both marshals knew that Mr. Wardlaw merely approached rapidly and shouted at them to please not hurt Mr. Heid.

On these facts, all known to the marshals, Mr. Wardlaw was a privileged intervenor. The cases cited by the court below so hold. App. 7a-9a.[16] Privileged intervenors are free of criminal liability. *Id.* Police lack probable cause to arrest and prosecute persons whom they know are free of criminal liability.[17]

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[16] Since Marshal Pickett attacked Mr. Heid with force likely to cause death or serious injury, *see* n. 2, *supra*, Mr. Wardlaw was privileged to use similar force to defend Mr. Heid. *Restatement (Second) of Torts*, §76, Comment a (1965) (intervenor may use "means intended or likely to cause death or serious bodily harm" if he "reasonably perceives that the third person is in imminent peril of death or serious bodily harm"). Mr. Wardlaw, however, used no force at all. His conduct therefore was well within the scope of his privilege.

[17] The pre-trial probable cause determinations in the criminal case have no effect on Mr. Wardlaw's civil action, as the courts below acknowledged. App. 2a, 20a-21a. The trier of fact here is entitled to accept Mr. Wardlaw's version of the

The court reached its erroneous probable cause conclusion, App. 14a, by ignoring the key fact presented by Mr. Wardlaw's evidence. Both marshals knew that Marshal Pickett attacked Mr. Heid, thus rendering all of Mr. Wardlaw's actions privileged. To evade their liability and to justify their arrest and prosecution of Mr. Wardlaw, the marshals knew they had to lie about what happened, and lie they did.

The marshals' arrest of Mr. Wardlaw and their false complaint procuring his indictment and prosecution violated the Fourth and Fifth Amendments. *Malley v. Briggs*, 475 U.S. 335 (1986); *Pierson v. Ray*, 386 U.S. 547 (1967); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Anthony v. Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992); *Edmond v. United States Postal Service General Counsel*, 949 F.2d 415 (D.C. Cir. 1991); *Jones v. City of Chicago*, 856 F.2d 985, 993-994 (7th Cir. 1988); *White v. Frank*, 855 F.2d 956, 961-962 (2d Cir. 1988); *Strength v. Hubert*, 854 F.2d 421, 425-426 (11th Cir. 1988).[18] The Court should review and reverse the contrary ruling below.

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events, in its entirety. *Dixon v. Richer*, 922 F.2d 1456, 1459 (10th Cir. 1991).

[18] In the courts below, Mr. Wardlaw claimed that his arrest, detention, and prosecution violated the Fourth Amendment prohibition against unreasonable seizure and the Fifth Amendment prohibition against deprivation of liberty without due process. He presses both claims here. His case does not present the defect found in *Albright v. Oliver*, ___ U.S. ___, No. 92-833 (January 24, 1994) (petitioner's failure to invoke Fourth Amendment precludes consideration of malicious prosecution claim) (plurality opinion).

CONCLUSION

For these reasons, Mr. Wardlaw's petition should be granted.

Respectfully submitted,

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March 3, 1994

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 8, 1993, Decided September 10, 1993

No. 91-5070

WILLIAM C. WARDLAW,
APPELLANT

v.

WILLIAM R. PICKETT, DEPUTY
UNITED STATES MARSHAL, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 89-01557)

Daniel M. Schember argued the cause for appellant.

John R. Munich, Assistant United States Attorney, argued for the appellees. On brief were *Jay B. Stephens*, United States Attorney at the time the brief was filed, and *John D. Bates* and *R. Craig Lawrence*, Assistant United States Attorneys. *John C. Cleary*, Assistant United States Attorney, also entered an appearance for appellees.

Before BUCKLEY, D. H. GINSBURG and HENDERSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge:* William Wardlaw brought a *Bivens* action[1] in district court seeking damages and alleging that United States Deputy Marshals William Pickett and Albert Crew violated his constitutional rights by using excessive force against him, falsely arresting and wrongfully prosecuting him. Relying in part on the defendants' claims of qualified immunity, the district court granted them summary judgment. For the reasons explained below, we affirm the district court.

I.

Wardlaw and the two deputies presented the district court with two very different accounts of the relevant events. Because we are reviewing the grant of summary judgment in favor of the defendants, we view "the facts in the record and all reasonable inferences derived therefrom in a light most favorable to the plaintiff." *Martin v. Malhoyt*, 830 F.2d 237, 253-54 (D.C. Cir. 1987). Accordingly, we consider Wardlaw's version of events.

A. Wardlaw's Account

On June 7, 1988, Wardlaw and John Heid were watching a hearing in a courtroom on the sixth floor of the United States Courthouse in Washington D.C. The hearing related to

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[1] In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the plaintiff sought and recovered damages against federal employees for violation of his constitutional rights.

a lawsuit challenging conditions in a women's prison and, because the Marshal's office had received information leading it to believe that a demonstration might occur, security around the courtroom was especially tight. Late in the afternoon, the judge called a recess. Deputy Marshal Donald Horton observed that Heid refused to stand as the judge left the room. As the judge re-entered the courtroom after the recess, Horton approached Heid and told him to stand, but Heid resisted, saying that he stood for no one but God.

Deputy Horton then asked Heid to leave the courtroom but Heid again refused, telling Horton that he would leave only if carried out. Horton summoned Deputy Marshal Crew and together the two removed Heid, who went limp instead of resisting. Outside, Horton turned Heid over to Crew and Deputy Marshal Pickett, who had come to assist. Together, Pickett and Crew moved Heid to the stairwell to take him to the first floor and from there to eject him from the courthouse. Wardlaw, who had witnessed the events involving his friend, followed.

When Wardlaw first entered the stairwell, he saw Pickett holding Heid "like a sack of potatoes" and dragging him down the steps from the sixth floor. Crew accompanied Pickett and Heid. On a landing halfway to the fifth floor, according to Wardlaw, Pickett punched and kicked Heid. Simultaneously, Wardlaw rushed down the stairs toward Pickett, shouting out "Don't hurt him please. He is totally nonviolent." Pickett turned and punched the approaching Wardlaw once in the jaw and two or three times in the chest.

Heid attempted to move but Crew restrained him. Heid then told Wardlaw to get the deputies' names. At that point, Wardlaw claims that Pickett said to Crew, "We better charge them with assault." Both Wardlaw and Heid were arrested and tried for assault. Deputies Pickett and Crew testified at

the trial, at the conclusion of which Heid was convicted and Wardlaw was acquitted. *See United States v. Heid*, 904 F.2d 69 (D.C. Cir. 1990) (summarizing events at trial). Although Wardlaw acknowledges on appeal that he refused medical treatment for his injuries after the scuffle, he maintains that he experienced substantial pain in his chest and jaw over the next several months.[2]

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[2] As stated earlier, we must view the facts in the light most favorable to the plaintiff. Nevertheless, to provide the complete picture at this stage in the litigation, we note that Pickett and Crew give a different account of what occurred after the parties left the courtroom. The deputies claim they dragged Heid in a sitting position from the courtroom to the stairs. At the top of the stairs, they turned Heid over to face forward so that only his feet dragged on the ground. They then started down the stairs to the first floor in order to remove Heid from the courthouse. As they descended, Pickett and Crew claim they heard Wardlaw crash through the doors and run toward them, shouting "Let my friend go." Wardlaw reached the deputies almost instantaneously, collided with Pickett and caused Pickett to lose his grip on Heid. Because Wardlaw continued to struggle, Pickett struck him several times, landing one punch on his jaw and several others on his chest and ribs.

As a result of the collision, Heid regained his footing and Crew tried to restrain. Him. Suddenly, Heid broke free, leapt toward Pickett and attempted to tackle him from behind. Pickett swung around and threw one punch, hitting Heid in the face. The deputies then placed Heid and Wardlaw under arrest for assault.

B. District Court Proceedings

In district court, Wardlaw alleged that Pickett and Crew committed numerous torts including false arrest, wrongful prosecution and the use of excessive force.[3] In granting the deputies summary judgment on the false arrest and wrongful prosecution claims, the district court found that "there is simply no evidence of malice or bad faith on the part of the marshals." Mem. at 8. In addition, the court concluded that the marshals had probable cause to arrest Wardlaw for his role in the altercation.

The district court also granted the defendants summary judgment on the excessive force claim because it concluded that the "plaintiff's fourth amendment excessive force claim does not overcome the defense of qualified immunity." Mem. at 11. Qualified immunity protects a government official from suits for damages if the official's conduct did not violate clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To support its result, the court decided that "the unlawfulness of defendants' actions [was not] 'so apparent' that no reasonable officer could have believed in the lawfulness of his actions." Mem. at 10.

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[3] Wardlaw also alleged that Pickett and Crew committed the common-law torts of assault, battery and false imprisonment. Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679, the United states replaced Pickett and Crew as the defendant. Thus, no common-law tort claims now remain pending against any individual defendants. The district court denied the government's motion for summary judgment on the common-law claims and that denial is not before us on appeal.

II.

A. Excessive Force Claim Against Pickett

Wardlaw's excessive force argument proceeds as follows. Wardlaw first asserts a common-law privilege to intervene in an arrest in which law enforcement officers use excessive force. Although we have not ruled on the existence or scope of that privilege, it has been recognized in other jurisdictions.[4] In addition, Wardlaw argues that two Supreme Court decisions could be interpreted as creating an inference that the privilege exists. In *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976), the Supreme Court indicated that a claim pursued under 42 U.S.C. § 1983 should be interpreted in conformity with traditional tort defenses and immunities. And in *Butz v. Economou*, 438 U.S. 478, 500 (1978), the Court stated that the law governing a *Bivens* action should mirror section 1983 law. According, Wardlaw asserts that the privilege was clearly established at the time the incident occurred.

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[4] *See, e.g., United States v. Grimes*, 413 F.2d 1376 (7th Cir. 1969) (prisoner may intervene in defense of fellow prisoner he reasonably thinks to be victim of unauthorized, unprovoked assault by prison officials); *United States v. Ochoa*, 526 F.2d 1278, 1281 (5th Cir. 1976) (right to defend third person from attack is defense to charge of assaulting federal officer); *Letson v. State*, 805 S.W.2d 801 (Tex. App.-Houston [14th Dist.] 1990); *State v. Smits*, 792 P.2d 565 (Wash. App. 1990); *State v. Westlund*, 536 P.2d 20, 25 (Wash. App. 1975) (bystander may come to aid of one being lawfully arrested by uniformed police officer if arrestee is in actual danger of serious physical injury); *Strube v. State*, 739 P.2d 1013 (Okla. Cr. 1987); *State v. Gelinas*, 417 A.2d 1381, 1386 (R.I. 1980); *State v. Anderson*, 253 S.E.2d 48 (N.C. 1979); *State v. Wenger*, 390 N.E.2d 801 (Ohio 1979); *Coleman v. State*, 320 A.2d 740 (Del. 1974).

Wardlaw next argues that he acted within the scope of the privilege in rushing down the stairs and shouting at the two deputies to desist. An intervenor, according to Wardlaw, may use force against the officers in proportion to the excess force the officers use against the arrestee. Because Pickett allegedly hit and kicked Heid, Wardlaw claims he was entitled to accost Pickett. Instead, he simply rushed down the steps shouting at Pickett; thus, Wardlaw claims he was well within the scope of the privilege. He maintains that Pickett, as the aggressor, had no right to resist and, by doing so, violated Wardlaw's clearly established right to intervene.

We find this argument unpersuasive for several reasons. First, we note that jurisdictions that have recognized the privilege to intervene in an arrest have recognized it as a defense to the intervenor's criminal and civil liability, not as a means of imposing liability on law enforcement officers. In some jurisdictions the privilege grows out of the *arrestee's* right to defend *himself* from the use of excessive force without incurring criminal liability. By coming to the arrestee's aid, an intervenor places himself in the arrestee's shoes and is entitled to defend himself. *See, e.g., State v. Anderson*, 253 S.E.2d 48 (N.C. 1979); *State v. Wenger*, 390 N.E.2d 801 (Ohio 1979). These jurisdiction, then, recognize that "one who comes to the aid of an arrestee must do so at his own peril." *State v. Gelinas*, 417 A.2d 1381, 1386 (R.I. 1980). Other jurisdictions allow the intervenor to assert the privilege based on a reasonable but mistaken belief that excessive force was being used against the arrestee. *See, e.g., Graves v. United States*, 554 A.2d 1145 (D.C. App. 1989); *Commonwealth v. Martin*, 341 N.E.2d 885 (Mass. 1976). Even in these jurisdiction, however, the privilege constitutes no more than a recognition of a reluctance to impose liability on individuals who reasonably acted in an attempt to save others from what they perceived as serious, imminent danger. "[I]t is hardly conceivable that the law . . . should mark as

criminal those who intervene to protect others. . . . To the fear of involvement and of injury to oneself if one answered a call for help would be added the fear of possible criminal prosecution." *Commonwealth v. Martin*, 341 N.E.2d at 891; *cf. State v. Westlund*, 536 P.2d 20, 25 (Wash. App. 1975) ("in rare circumstances, the brutality may be so dangerous to the arrestee that his resistance or the intervention of others is necessary to prevent death or serious disability"); *Commonwealth v. French*, 611 A.2d 175, 179 (Pa. 1992) (referring to privilege as "justification" for action that would otherwise be criminal).

That concern, however, must be balanced against the ability of law enforcement officers to perform their duties. They must be free to use the reasonable force necessary to effect an arrest. Giving the privilege too broad a scope might easily deter officers from using force when it is necessary and justified. In recognition of this concern, some jurisdictions extend the privilege only to situations in which an officer uses excessive force capable of causing death or serious bodily injury.[5] *See e.g., Commonwealth v. French*, 611 A.2d at 175;

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[5] Many states have also distinguished between the privilege to intervene in an illegal arrest, which they have abolished, and the privilege to intervene when an officer uses excessive force, which they retain. The elimination of the right to intervene to prevent an illegal arrest is based on the recognition that an arrestee's liberty interest is now protected by safeguards which did not exist at common law, including prompt arraignment, reasonable bail, appointment of counsel, the exclusionary rule and the right to a speedy trial. On the other hand, these safeguards do not insulate an individual from the use of excessive force. *See, e.g., Miller v. State*, 462 P.2d 421 (Alaska 1969); *State v. Hatton*, 568 P.2d 1040 (Ariz. 1977); *State v. Richardson*, 511 P.2d 263 (Idaho 1973); *State v. Thomas*, 262 N.W.2d 607 (Iowa 1978); *State*

State v. Smits, 792 P.2d 565, 569 (Wash App. 1990). Regardless of other distinctions among the jurisdictions that recognize the privilege, the privilege to intervene has *uniformly* been recognized as a shield, not a sword. It is applied to exempt from liability an intervenor who reasonably attempts to save another from real danger. This rationale for the application of the privilege supports its use as a defense against criminal or civil liability but it does not justify using the privilege to impose liability on the arresting officers.

Moreover, using the privilege to assess a law enforcement officer's liability would create a framework for excessive force claims that places unrealistic and unjustifiable burdens on the officer. "The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' " *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). As the Supreme Court has recognized, "[t]hat security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of the English and American common law." *Id.* Under the analysis that Wardlaw urges on us, an officer in Pickett's shoes would have to determine (1) whether he had used unreasonable force against Heid, (2) whether Wardlaw was rushing at him in order to intervene in the application of force or instead to attack him, (3) whether Wardlaw intended to use force against him, (4) whether the force Wardlaw was about to use was likely to be proportional to the force he had used on Heid and, finally, based on the officer's earlier

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v. Austin, 381 A.2d 652 (Me. 1978); *Glover v. State*, 594 A.2d 1224 (Md. App. 1991); *In re Welfare of Burns*, 284 N.W.2d 359 (Minn. 1979); *State v. Nunes*, 546 S.W.2d 759 (Mo. Ct. App. 1977); *State v. Koonce*, 214 A.2d 428 (N.J. 1965).

conclusions, (5) whether he had any right to resist. Law enforcement officers are routinely required to make split second decisions but the number of decisions Wardlaw's analysis would mandate is troubling. Even more troubling, an officer would have no room for error in making his instantaneous assessments. Liability would result from any action that violated Wardlaw's privilege to intervene. But whenever a bystander seeks to intervene in an arrest, all parties face a dangerous and potentially explosive situation and Wardlaw's proposal would only heighten the danger and put both the officers and the arrestee in more precarious positions.

Instead, we recognize that, whatever the circumstances prompting law enforcement officers to use force, whether it be self-defense, defense of another or resistance to arrest, when, as here, a fourth amendment violation is alleged, the inquiry remains whether the force applied was reasonable. Determining whether the force was reasonable requires us to balance the intrusion on the rights of the individual against the government interests at stake. *United States v. Place*, 462 U.S. 696 (1983). In *Graham v. Connor*, 490 U.S. 386, 397 (1989), the Supreme Court established the framework for the balancing, declaring that "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[6] The objective reasonableness of the force used "must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Id.* at 396. Accordingly, "[n]ot every push or shove, even if it may later seem

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[6] Even before *Graham*, we used an "objective reasonableness" standard to analyze excessive force claims. *See Martin v. Malhoyt*, 830 F.2d at 253.

unnecessary in the peace of a judge's chambers, . . . violates the Fourth Amendment." *Id.* (internal cite omitted).

In *Graham*, however, the Supreme Court expressly reserved the question of the proper application of qualified immunity to a fourth amendment excessive force claim. Following *Graham*, several courts have found that qualified immunity does not require a second "objective reasonableness" analysis in the fourth amendment context. *See, e.g., Jackson v. Hoylman*, 933 F.2d 401, 402-03 (6th Cir. 1991); *Dixon v. Richer*, 922 F.2d 1456, 1458 (10th Cir. 1991). Although we have not previously answered the question, we have stated that "[w]e too doubt whether a substantively distinct qualified immunity defense would be available to an officer acting after *Graham*." *Hunter v. District of Columbia*, 943 F.2d 69, 77 (D.C. Cir. 1991).

In general, qualified immunity extends to "government officials performing discretionary functions . . . insofar as their conduct does not violate clearly establishded . . . rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Qualified immunity, therefore, depends on the "objective legal reasonableness of the [official's] action." *Id.* at 819. Thus, the scope of qualified immunity must be evaluated using the same "objective reasonableness" criteria with which *Graham* directs us to scrutinize an officer's actions under the fourth amendment. We believe that standard provides the test for evaluating both the scope of the officer's qualified immunity as well as the plaintiff's claim of excessive force under the fourth amendment. We therefore now conclude, as we did in *Martin v. Malhoyt*, that a defendant's motion for summary judgment is to be denied only when, viewing the facts in the record and all reasonable inferences derived therefrom in the light most favorable to the plaintiff, a reasonable jury could conclude that the excessiveness of the force is so apparent that no reasonable officer could have

believed in the lawfulness of his actions. *Martin*, 830 F.2d at 253-54.

In applying this test to Wardlaw's account of events, we must consider all of the facts as well as the inferences arising from the facts. *See Hunter*, 943 F.2d at 76. Here, several factors suggest that Pickett's use of force was not so excessive that no reasonable officer could have believed in the lawfulness of his actions. First, Wardlaw does not dispute that the Marshal's office had taken additional security precautions the day of the hearing due to the nature of the claims being aired and the fact that the officers expected a demonstration of some sort. Pickett, having been warned of a demonstration, reasonably could have anticipated a confrontation, especially while removing an uncooperative spectator from the courthouse. More importantly, when Wardlaw rushed down the stairs toward them, Pickett and Crew were in a vulnerable position, caught in a stairwell and moving an uncooperative individual. Wardlaw admits that he shouted at the deputies as he approached them, thus, again reasonably, raising a fear that he was about to attack. Furthermore, as Wardlaw acknowledges, Pickett hit him no more than three or four times--all in rapid succession. Once Wardlaw sat down on the stairs and it became apparent that he was not going to attack, Pickett did not hit him. Finally, Wardlaw did not consider his injuries severe enough to require medical attention.[7] Given

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[7] By considering this factor, we do not suggest that an individual *must* suffer significant injuries in order for the force used to be unreasonable. Although the severity of Wardlaw' injuries is not by itself the basis for deciding whether the force used was excessive, it does provide some indication of the degree of force Pickett used. Thus, it is a relevant factor under a "test of reasonableness . . . not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

these undisputed facts, we believe that no reasonable jury could find that Pickett's use of force was so excessive that no reasonable officer could have believed it to be lawful.

B. Excessive Force Claim against Crew

Wardlaw does not allege that Crew struck him or that Crew used any force against him at all. Instead, Wardlaw claims that Crew's liability results from his failure to intervene to protect Heid from Pickett, which action would have prevented Wardlaw's having to go to Heid's rescue. We find that no reasonable jury could conclude that Crew's inaction was such that a reasonable officer could not have thought it lawful. The entire confrontation lasted approximately ten to fifteen seconds. Even if Crew had attempted to intervene, he might not have succeeded in separating Pickett and Heid any faster than their own actions and reactions did. Accordingly, we affirm the district court's grant of summary judgment to Crew on this claim.

C. False Arrest Claims against Crew and Pickett

Where, as here, a false arrest claim is based on a warrantless arrest, the defendant officers must establish probable cause to arrest. *Dellums v. Powell*, 566 F.2d 167, 175 (D.C. Cir. 1977). Pickett and Crew admit they had no warrant but they assert that they had probable cause to arrest Wardlaw for assault. They also assert their qualified immunity. In *Malley v. Briggs*, 475 U.S. 335, 341 (1986), the Supreme Court held that an officer retains qualified immunity from suit if he had an objectively reasonable basis for believing that the facts and circumstances surrounding the arrest were sufficient to establish probable cause.

Here, Wardlaw's version of the facts supports the conclusion that probable cause existed. Wardlaw admits to

bursting through the stairwell doors, rushing down a flight of steps toward the officers and shouting at them not to hurt Heid. These facts give rise to a reasonable inference that Wardlaw was about to assault the deputies. Pickett's immediate confrontation with Wardlaw did nothing to negate that inference. Accordingly, we conclude that the deputies had probable cause to arrest Wardlaw for assault.

Even were we to conclude that probable cause did not exist, we would nonetheless find the deputies immune from suit. Qualified immunity shields Pickett and Crew "from suit for damages if 'a reasonable officer could have believed [Wardlaw's arrest] to be lawful, in light of clearly established law and the information the officers possessed.' " *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). Pickett and Crew are entitled to qualified immunity even if they "reasonably but mistakenly" concluded that probable cause existed. *Id.* Officials who make reasonable errors retain their immunity so that they do "not err always on the side of caution because they fear being sued." *Id.* at 537.

When Wardlaw shouted and ran down the steps toward Pickett, the deputies were in the middle of a stairwell landing, fully occupied with attempting to remove a limp and uncooperative Heid. Wardlaw's actions could have reasonably made him appear to be an aggressor seeking to secure Heid's release. In this situation, an objectively reasonable officer could have believed that charging Wardlaw with assault was lawful. Thus, even assuming *arguendo* that Pickett and Crew (as well as the grand jury that subsequently indicted both Heid and Wardlaw) erred in charging Wardlaw, the deputies would nonetheless be entitled to immunity from suit because their decision to arrest Wardlaw was reasonable.

D. Wrongful Prosecution Claims Against Pickett and Crew

A plaintiff may bring an action against officials who institute and pursue a prosecution without probable cause if the plaintiff can allege injury of a constitutional magnitude. *See Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989). Here, we need not determine whether Wardlaw suffered such injury because we have already concluded (1) that the deputies had probable cause and (2) that even assuming *arguendo* that probable cause was lacking, the deputies' conclusion that probable cause existed was objectively reasonable. These conclusions entitle Pickett and Crew to summary judgment on the wrongful prosecution claim because the absence of probable cause is an essential element of the claim.

III.

We reject Wardlaw's contention that the privilege to intervene in an arrest to protect the arrestee may be used as a sword to impose liability on an officer who allegedly uses excessive force against the intervenor. To the extent that it exists at common law, the privilege merely shields the intervenor from criminal and civil liability. An intervenor's excessive force claim, then, is more appropriately analyzed under the standard objective reasonableness rubric enunciated by the Supreme Court in *Graham*. We hold that no reasonable jury could conclude that the excessiveness of Pickett's and Crew's actions was so apparent that no reasonable officer could conclude they acted lawfully. Accordingly, we affirm the grant of summary judgment in their favor.

We also affirm the district court's grant of summary judgment to the defendant officers on Wardlaw's false arrest and wrongful prosecution claims. The facts, as Wardlaw

alleges them, support a finding of probable cause to arrest him. Even if probable cause were lacking, we think the facts sufficient to support the finding that the officers acted on an objectively reasonable, even if mistaken, belief that probable cause existed, thus entitling them to qualified immunity. Accordingly, the judgment of the district court is

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM C. WARDLAW,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-1557
WILLIAM R. PICKETT, et al.,	)	(OG)
	)	
Defendants.	)	
	)	

Counsel: William C. Wardlaw, Washington, D.C., pro se.

John. C. Cleary, Assistant United States Attorney, Washington, D.C., for defendants.

MEMORANDUM

William Wardlaw brings this civil action against two United States Marshals and the United States, seeking damages in excess of $1 million stemming from a scuffle that ensued in a stairwell of this courthouse. Plaintiff alleges that defendants committed various common law torts and deprived plaintiff of various constitutional rights. Defendants have moved to dismiss the complaint or, in the alternative, for summary judgment. The motion is now before the Court.

I. BACKGROUND

On June 7, 1988, John Heid and William Wardlaw attended a hearing in the courtroom of Judge Barrington

Parker. Deputy Marshal Donald Horton observed that Heid failed to stand when Judge Parker both left and re-entered the courtroom, despite Horton's requests that he do so. Heid informed Horton that he stood for no one but God.

When Horton asked Heid to step out of the courtroom, Heid refused. He stated that he would leave only if carried out. Horton summoned another Deputy Marshal, Albert Crew, to assist him in removing Heid. When the Marshals took hold of Heid, he went limp. Horton and Crew carried Heid from the courtroom, at which point Horton instructed Crew and another Deputy Marshal, William Pickett, to escort Heid out of the courthouse. Pickett and Crew then carried Heid, who remained limp, to the stairwell.

As the three proceeded down the stairs, William Wardlaw, Heid's friend and the plaintiff in this case, entered the stairwell. A scuffle ensued. There is conflicting evidence as to what transpired. According to the Marshals, Wardlaw ran into the stairwell and down the stairs, shouting at the Marshals to let Heid go. He then ran into the backside of Pickett, whereupon Pickett turned and struck him twice in the face. Heid then tried to tackle Pickett from behind, whereupon Pickett struck him and subdued him.

According to Wardlaw's account, in contrast, Wardlaw entered the stairwell and observed Pickett kicking Heid in the head, with no apparent provocation. Wardlaw shouted at Pickett to stop, yelling: "Don't hurt him! Please! He is totally nonviolent!" Complaint ¶ 14. As Wardlaw approached Pickett, Pickett turned and punched him, once in the jaw and twice in the chest. Heid tried to place himself between Wardlaw and Pickett in order to protect Wardlaw, but Crew restrained him from doing so.

Following this scuffle, Heid and Wardlaw were arrested and charged with assaulting a federal officer engaged in the performance of his official duties, in violation of 18 U.S.C. § 111. The jury returned a verdict convicting Heid but acquitting Wardlaw. Heid's post-trial motion for judgment of acquittal was denied by this Court. Heid appealed his conviction, arguing that he was convicted of violating Section 111 for simply being limp, and that being limp cannot, as a matter of law, constitute a criminal act. The Court of Appeals rejected Heid's argument and affirmed his conviction. United States v. Heid, 904 F.2d 69 (D.C. Cir. 1990).

Wardlaw has now filed this civil action, raising several constitutional and common law tort claims. Specifically, he alleges that Pickett and Crew are liable in tort for assault, battery, intentional infliction of emotional distress, defamation, conspiracy, false arrest, false imprisonment, malicious prosecution, and abuse of process. Complaint ¶¶ 37, 42. He also alleges that defendants deprived him of the privileges and immunities guaranteed by Article IV, § 2 of the Constitution, and that defendants violated his fourth, fifth and ninth amendment rights. Id. ¶¶ 33-34, 39. He seeks $1,050,000 in compensatory and punitive damages, an order expunging all records relating to the criminal trial, a judgment declaring the arrest and subsequent assault to have been unlawful, and an award of costs and reasonable attorney's fees. Id. ¶ 43.

II. DISCUSSION

A. Exhaustion of Administrative Remedies

In their motion to dismiss, defendants argue that plaintiff may not maintain his common law tort claims against these federal defendants because plaintiff never filed an administrative claim under the Federal Tort Claims Act

("FTCA"). Under the FTCA, a plaintiff in Wardlaw's position must first file an administrative claim with the agency from which he seeks relief. 28 U.S.C. § 2675(a). Failure to file an administrative claim deprives this Court of subject matter jurisdiction. Moreover, since this statutory requirement is jurisdictional, it may not be waived by equitable or other considerations. Hohri v. United States, 782 F.2d 227, 245-46 (D.C. Cir. 1986), rev'd on other grounds, 482 U.S. 64 (1987).

After defendants filed this motion, plaintiff filed an administrative claim with the appropriate federal agency -- in this case, the United States Marshals Service. Plaintiff's Exhibit J. Under the FTCA, plaintiff's administrative claim is ripe for adjudication once the federal agancy acts upon it, or after a period of six months from the filing date has passed. 28 U.S.C. § 2675(a). The Court is not aware that the Marshals Service has acted on plaintiff's claim. However, since the claim was filed on December 15, 1989, the six-month statutory period has elapsed. Therefore, defendants' exhaustion argument no longer has merit and plaintiff's common law tort claims are now ripe for judicial review.

B. Plaintiff's Common Law Tort Claims

Apart from arguing that plaintiff's common law tort claims are not properly before the Court due to plaintiff's failure to exhaust his administrative remedies -- an issue which now is moot -- defendants do not argue that plaintiff has otherwise failed to state a claim for assault, battery, false imprisonment, and so forth. As noted above, the evidence regarding what transpired during the scuffle in the stairwell is conflicting. Summary judgment on these tort claims is therefore inappropriate. Although it is true that a jury already made findings of fact when rendering its verdicts in the earlier criminal case, defendants nowhere suggest that those findings somehow preclude this civil suit brought by the acquitted

defendant. Accordingly, the Court denies defendants' motion to dismiss plaintiff's common law tort claims.

It is important to note that defendants do not raise the issue of qualified immunity with respect to the common law tort claims. They raise it only in reference to plaintiff's constitutional claims. In Martin v. Malhoyt, 830 F.2d 237 (D.C. Cir. 1987), our Court of Appeals, after an extensive analysis, clarified the scope of the qualified immunity doctrine. That case, like this one, involved both common law and constitutional claims brought by plaintiffs who alleged they were assaulted by federal officers during the course of their arrests. Although the Court of Appeals found that the officers were entitled to qualified immunity as to some constitutional claims, the Court squarely held that dismissal was unwarranted as to the tort claims. The Court explained:

> As we have several times emphasized in this opinion, plaintiffs' descriptions of the episodes in suit are directly contradicted by the officers' statements, and the officers' liability will ultimately turn on which of the accounts the factfinder believes. A reviewing court's role is not to resolve these factual disputes; merely verifying their existence is sufficient, at this stage of the proceedings, for us to uphold the district court's denial of the officers' motions to dismiss these claims.

Id. at 263. This analysis controls Wardlaw's tort claims in this case, and precludes their dismissal on the basis of qualified immunity.

C. Plaintiff's Constitutional Claims

A plaintiff can bring a federal cause of action for damages against a federal agent for a violation of his constitutional

rights. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). In recognition, however, that these actions involve social costs such as "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," the Supreme Court has allowed federal agents to claim the defense of qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). Under this defense, discretionary actions of federal officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. Therefore, with respect to a motion for summary judgment, the Court of Appeals has stated that the motion should be granted unless after

> viewing the facts in the record and all reasonable inferences derived therefrom in a light most favorable to the plaintiff, a reasonable jury could conclude that the unlawfulness of defendant's actions was so 'apparent' that no reasonable officer could have believed in the lawfulness of his actions.

Martin v. Malhoyt, 830 F.2d 237, 253-54 (D.C. Cir. 1987).

As the following demonstrates, all of plaintiff's constitutional claims either fail to state a claim upon which relief can be granted or fail to overcome the defense of qualified immunity.

1. Fifth Amendment

Wardlaw's allegation that he was denied his fifth amendment rights appears to raise claims of both substantive and procedural due process. Invoking the rubric of substantive due process, Wardlaw maintains that he was

subjected to a malicious prosecution, in violation of the fifth amendment.

An action for malicious prosecution is available against an individual who (1) institutes criminal proceedings against a plaintiff, (2) with malice, (3) without probable cause, (4) where the criminal proceedings terminate in plaintiff's favor. White v. Frank, 855 F.2d 956, 959 n.2 (2d Cir. 1988). As defendants correctly point out, plaintiff never adequately explains how the facts of this case support a cause of action for malicious prosecution. Aside from plaintiff's allegations, there is simply no evidence of malice or bad faith on the part of the marshals. In addition, under the circumstances, there certainly appears to have been probable cause to arrest Wardlaw and Heid for their role in the disruption.

Invoking the rubric of procedural due process, plaintiff also alleges that defendants infringed "his right not to be deprived of liberty without due process of law." Complaint ¶¶ 34, 39. Under this claim, plaintiff appears to be arguing that he was denied due process when he was required to spend two weeks in the District of Columbia Jail. As defendants point out, plaintiff was incarcerated because he refused to accept a pre-condition order requiring him to stay away from the U.S. Courthouse. The order was imposed by Magistrate Dwyer following a hearing. Complaint ¶¶ 27-28. Thus, the Court finds that plaintiff received all the process he was due.

The Court of Appeals has noted that "it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation, despite the loss of liberty that may be involved." Sami v. United States, 617 F.2d 755, 773 (D.C. Cir. 1979). Even under the most favorable review of the facts of this case, plaintiff has failed to make out an actionable claim of fifth amendment proportions.

2. Ninth Amendment and Privileges and Immunities Clause

Plaintiff's ninth amendment and privileges and immunities claims are catch-all claims, with no independent factual or legal basis. As courts have frequently noted, the ninth amendment "has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim." Strandberg v. City of Helena, 791 F.2d 744, 748 (9th Cir. 1986); accord, Bartel v. Federal Aviation Administration, 617 F. Supp. 190, 194 (D.D.C. 1985). In addition, the privileges and immunities clause of Article IV, § 2, applies only to the "Citizens of each State." Accordingly, that clause does not apply in the District of Columbia. Duehay v. Acacia Mutual Life Ins. Co., 105 F.2d 768 (D.C. Cir. 1939). For these reasons, the Court dismisses plaintiff's ninth amendment and privileges and immunities claims.

3. Fourth Amendment

Plaintiff's fourth amendment claim focuses on his allegation that defendants used "excessive force" in making his arrest. The legal principles governing fourth amendment claims against law enforcement officers alleged to have used excessive force were recently summarized by the Supreme Court in Graham v. Connor, 109 S. Ct. 1865 (1989). In that case, the Supreme Court clarified that such excessive force claims are subject to an "objective reasonableness" standard. Specifically, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 1872. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving

-- about the amount of force that is necessary in a particular situation." Id.

In addition, to overcome the defense of qualified immunity, the unlawfulness of defendants' actions must be "so 'apparent' that no reasonable officer could have believed in the lawfulness of his actions." Martin v. Malhoyt, 830 F.2d 237, 253-54 (D.C. Cir. 1987).

Under the circumstances of this case, Wardlaw's excessive force claim does not rise to the level of a constitutional violation. There were heightened security measures in effect in Judge Parker's courtroom on the day in question. The events at issue unfolded rapidly. John Heid was physically ejected from the courthouse pursuant to an order of the court. Even accepting plaintiff's version of the facts, plaintiff admittedly shouted at Pickett and Crew as they attempted to carry off John Heid, thereby indicating some level of provocation. Plaintiff's injuries were limited; by his own trial testimony, he was not bleeding, he had no need for immediate medical treatment, he declined medical attention at the courthouse and later refused x-rays, and he treated the affected jaw by self-administration of cold water with a handkerchief, without the use of bandages, aspirin, or pain killers. Pl. Ex. A (trial transcript) at 35, 38-39, 66-67, 139. Thus, viewing the "totality of the circumstances," the Court finds plaintiff's fourth amendment excessive force claim does not overcome the defense of qualified immunity, and therefore, defendants' motion for summary judgment asto the excessive force claim is granted.

III. CONCLUSION

Because six months has passed since plaintiff filed his tort claim against the United States Marshals Service, defendants' exhaustion argument no longer has merit. This court,

therefore, has jurisdiction to hear plaintiff's common law tort claims. With respect to plaintiff's constitutional claims, however, the Court finds that all of the claims either fail to state a claim upon which relief can be granted or fail to overcome the defense of qualified immunity.

JUDGE OLIVER GASCH

Date: 12/5/90

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM C. WARDLAW,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-1557
WILLIAM R. PICKETT, et al.,	)	(OG)
	)	
Defendants.	)	
	)	

ORDER

Upon consideration of defendants' motion to dismiss or, in the alternative, for summary judgment, plaintiffs' opposition thereto, the arguments presented in open Court and the entire record herein, and for the reasons set forth in the accompanying Memorandum, it is by the Court this 5th day of December, 1990,

ORDERED that defendants' motion be, and hereby is, granted in part and denied in part; and it is further

ORDERED that defendants' motion be, and hereby is, granted with respect to plaintiffs' constitutional claims against the individual officers; and it is further

ORDERED that defendants' motion be, and hereby is, denied with respect to plaintiffs' common law tort claims against the United States.

JUDGE OLIVER GASCH

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM C. WARDLAW,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-1557
WILLIAM R. PICKETT, et al.,	)	(OG)
	)	
Defendants.	)	
	)	

MEMORANDUM-ORDER

On December 5, 1990, the Court partially granted the defendants' summary judgment motion. The Court found that all of the constitutional claims against Deputies Crew and Pickett either failed to state a claim upon which relief can be granted or were barred by the defense of qualified immunity. Plaintff has filed two motions to reconsider, which are now before the Court.

The motions argue (i) that the Court misstated the facts; (ii) that Wardlaw had a valid Fourth Amendment excessive force claim because he had a privilege to defend Heid and Pickett lacked a privilege to resist Wardlaw, because Pickett had no qualified immunity, and because Crew had no qualified immunity; (iii) that the Fifth Amendment malicious prosecution claim should not have been dismissed; and (iv) that the Fourth Amendment false arrest claim should not have been dismissed.

All of the above arguments, except one, were adressed in the Court's decision. Consequently, they form no basis for the

Court to reconsider its decision. The only argument which raises an issue that was not addressed in the Court's decision is the argument that Wardlaw had a privilege to defend Heid and that Pickett lacked a privilege to resist Wardlaw.

The Court finds, however, that this argument is without merit and forms no basis for the Court to reconsider its decision. A bystander "has no right to intervene [in an arrest] if there is reason for him to be aware that the arrest is being made by a peace officer or that the arrest is lawful." United States v. Heliczger, 373 F.2d 241, 248 (2d Cir. 1967), cert. denied, 388 U.S. 917 (1967). In this case, Wardlaw was certainly aware that Pickett was a United States Marshal. Wardlaw, therefore, had no privilege to intervene in the arrest of Heid.

Wherefore, upon consideration of plaintiff's motion to reconsider, defendants' opposition thereto, and the entire record herein, and for the above-noted reasons, it is by the Court this 22nd day of February, 1991,

ORDERED that the plaintiff's motion be, and hereby is, denied.

JUDGE OLIVER GASCH

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5070 **September Term, 1993**
CV 89-01557

William C. Wardlaw,

Appellant

v.

William R. Pickett, Deputy United States Marshal, et al.

United States Court of Appeals
For the District of Columbia Circuit
FILED Dec 06 1993
RON GARVIN
CLERK

BEFORE: Buckley, D.H. Ginsburg and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed October 25, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

FILED
MAY 20 1994
OFFICE OF THE CLERK

No. 93-1377

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM C. WARDLAW, PETITIONER

v.

WILLIAM R. PICKETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the defendants were entitled to qualified immunity.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1377

WILLIAM C. WARDLAW, PETITIONER

v.

WILLIAM R. PICKETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 1 F.3d 1297. The opinions of the district court (Pet. App. 17a-26a, 28a-29a) are unreported.

JURISDICTION

The court of appeals entered judgment on September 10, 1993, and denied rehearing on December 6, 1993. The petition for a writ of certiorari was filed on March 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 7, 1988, petitioner William Wardlaw and his friend John Heid attended a federal district court hearing in a courtroom on the sixth floor of the United States Courthouse in Washington, D.C. Security in the courtroom was high because the hearing involved conditions in a women's prison and the Marshal's Office had learned that a demonstration might occur. Deputy Marshal Donald Horton observed that Heid, who was seated on a bench in the public section of the courtroom, failed to stand both when the judge left the bench for a recess and when he reentered the courtroom. Deputy Horton asked Heid to stand, but Heid responded that he stood for no one but God. Pet. App. 2a-3a, 17a-18a.[1]

Deputy Horton then asked Heid to leave the courtroom. Heid refused, and said that he would leave only if carried out. Horton summoned respondent Deputy Marshal Albert Crew to assist him in removing Heid. When the deputies took hold of Heid, he went limp. Horton and Crew carried Heid from the courtroom, and Horton instructed Crew and Deputy Marshal William Pickett, the other respondent, to escort Heid out of the courthouse. Pet. App. 3a, 18a.

Respondents Pickett and Crew then carried Heid, who remained limp, to the stairwell. Petitioner Wardlaw, who had witnessed these events, followed. When Wardlaw entered the stairwell, he saw Pickett

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[1] For purposes of the respondents' motion for summary judgment, the district court and the court of appeals viewed the facts in the record and the inferences to be reasonably drawn therefrom in the light most favorable to petitioner. Pet. App. 2a, 12a, 15a-16a.

holding Heid "like a sack of potatoes" and dragging him on his back down the stairs. Pet. App. 3a, 18a; Pet. 3. When the deputies and Heid had reached a landing halfway to the fifth floor, Wardlaw saw Pickett kick and punch Heid in the face with no apparent provocation or response from Heid. Wardlaw rushed down the stairs and called out, "Don't hurt him please. He is totally nonviolent." Pet. App. 3a, 18a; Pet. 3.

As Wardlaw approached Pickett, Pickett turned and punched him once in the jaw and two or three times in the chest and shoulder. Pet. App. 3a, 18a; Pet. 3-4. Heid, still in Crew's grasp, unsuccessfully tried to place himself between Wardlaw and Pickett. Pet. App. 3a, 18a; Pet. 3. Heid told Wardlaw to get the deputies' names. Pickett said to Crew, "We better charge them with assault." Pet. App. 3a; Pet. 4. After the confrontation, Wardlaw refused medical treatment, but he maintained that he experienced substantial pain in his chest and jaw over the next several months. Pet. App. 4a; Pet. 4 n.3.

The deputies arrested Wardlaw and Heid, who were then charged with assaulting a federal officer engaged in the performance of his duties in violation of 18 U.S.C. 111. Pet. App. 3a, 19a; Pet. 5. Heid was convicted of assaulting Deputy Pickett, and Wardlaw was acquitted. Pet. App. 4a, 19a; Pet. 5 (citing *United States* v. *Heid*, 904 F.2d 69 (D.C. Cir. 1990)). Heid filed no civil action challenging the constitutionality of his arrest or prosecution.

2. Wardlaw brought this suit seeking damages against Pickett and Crew under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), for alleged violations of his constitutional rights. He

contended that respondents used excessive force in arresting him in violation of the Fourth Amendment, and that he was subjected to false arrest and malicious prosecution in violation of the Fifth Amendment.[2] The district court granted summary judgment for respondents on both claims. Pet. App. 22a-25a.

a. The court granted judgment on the Fourth Amendment claim on the ground that, in view of the totality of the circumstances as Wardlaw presented them, Crew's and Pickett's actions toward Wardlaw were not objectively unreasonable under *Graham* v. *Connor*, 490 U.S. 386 (1989). The challenged conduct was therefore not so clearly unlawful as to deprive the deputies of qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982), and *Martin* v. *Malhoyt*, 830 F.2d 237, 253-254 (D.C. Cir. 1987). Pet. App. 22a, 24a, 25a.

Wardlaw moved for reconsideration, contending that the evaluation of the reasonableness of the force used against him must take into account his common-law privilege to defend Heid against excessive force. That privilege, in Wardlaw's view, rendered the deputies' force against him unreasonable, and also negated any immunity the deputies might otherwise have had. The court denied that motion on the ground that Wardlaw "was certainly aware that Pickett was a United States Marshal," and therefore "had no

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[2] Petitioner's additional claim of a Ninth Amendment violation was dismissed by the district court, Pet. App. 24a, and he has not pursued it. Petitioner also initially asserted claims against the United States under the Federal Tort Claims Act, which he has since withdrawn. Pet. 5 n.6.

privilege to intervene in the arrest of Heid." Pet. App. 29a.

b. The district court rejected the claims of false arrest and malicious prosecution on the ground that, "[e]ven under the most favorable review of the facts of this case, [petitioner] has failed to make out an actionable claim of fifth amendment proportions." Pet. App. 23a. Wardlaw could point to "no evidence of malice or bad faith on the part of the marshals." *Ibid.* The court concluded that, in light of all the circumstances, "there certainly appears to have been probable cause to arrest Wardlaw and Heid for their role in the disruption." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-16a. The court assumed the existence of the privilege to protect Heid that Wardlaw asserted, *id.* at 6a-8a,[3] but disagreed about its effect on the excessive force claim: "We reject Wardlaw's contention that the privilege to intervene in an arrest to protect the arrestee may be used as a sword to impose liability on an officer who allegedly uses excessive force against the intervenor." *Id.* at 7a-11a, 15a. The court held that the common-law privilege to intervene to prevent the use of excessive force is, where it is recognized, "a defense to the intervenor's criminal and civil liability," not "a means of imposing liability on law enforcement officers." *Id.* at 7a. The court explained that "using the privilege to assess a law enforcement officer's liability would create a framework for

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[3] The court noted, however, that "some jurisdictions extend the privilege only to situations in which an officer uses excessive force capable of causing death or serious bodily injury." Pet. App. 8a.

excessive force claims that places unrealistic and unjustifiable burdens on the officer." *Id.* at 9a. Incorporating the privilege into the reasonable force analysis would produce the unacceptable result of requiring an officer in Pickett's shoes to determine:

> (1) whether he had used unreasonable force against Heid, (2) whether Wardlaw was rushing at him in order to intervene in the application of force or instead to attack him, (3) whether Wardlaw intended to use force against him, (4) whether the force Wardlaw was about to use was likely to be proportional to the force he had used on Heid and, finally, based on the officer's earlier conclusions, (5) whether he had any right to resist.

Id. at 9a-10a.

Instead of tailoring a new excessive-force standard for cases that might implicate a common-law privilege, the court simply held that the reasonableness standard of *Graham* v. *Connor*, 490 U.S. at 397, governs in all contexts. Pet. App. 10a, 15a. "[W]hatever the circumstances prompting law enforcement officers to use force, whether it be self-defense, defense of another or resistance to arrest, when, as here, a fourth amendment violation is alleged, the inquiry remains whether the force applied was reasonable." *Id.* at 10a.

Applying that standard to Wardlaw's version of the facts, the court concluded that Pickett's use of force to resist Wardlaw's intervention was "not so excessive that no reasonable officer could have believed in the lawfulness of his actions." Pet. App. 12a. In reaching that conclusion, the court considered the

following circumstances: (1) There was heightened security in the courtroom and the possibility of a demonstration, making it reasonable for Pickett to anticipate a confrontation in removing an uncooperative spectator from the courthouse; (2) Pickett and Crew were caught in a vulnerable position in the bend of a stairwell trying to move an uncooperative individual when Wardlaw rushed down the stairs toward them; (3) Wardlaw shouted at the deputies as he approached them, raising a reasonable fear that he was about to attack; (4) Pickett hit Wardlaw no more than three or four times in rapid succession; (5) as soon as Wardlaw sat down on the stairs and no longer appeared to be attacking, Pickett stopped using force; and (6) Wardlaw's injury was not so severe as to require medical attention. *Ibid.* The court concluded that, "[g]iven these undisputed facts, we believe that no reasonable jury could find that Pickett's use of force was so excessive that no reasonable officer could have believed it to be lawful." *Id.* at 12a-13a.

The court also affirmed summary judgment in Crew's favor on Wardlaw's excessive-force claim against him. Pet. App. 13a. The claim against Crew was based solely on Crew's inaction. Wardlaw contended that Crew's failure to prevent Pickett from using unreasonable force against Heid created the need for Wardlaw to intercede to protect Heid, which in turn made Wardlaw vulnerable to Pickett's blows. In view of the brevity of the entire confrontation, which by Wardlaw's own account lasted only ten to 15 seconds, the court found that "no reasonable jury could conclude that Crew's inaction was such that a reasonable officer could not have thought it lawful." *Ibid.* There was no basis from which to conclude that,

had Crew acted differently, he could have separated Pickett and Heid "any faster than their own actions and reactions did." *Ibid.*

Finally, the court upheld judgment against Wardlaw on his false arrest and wrongful prosecution claims against both Pickett and Crew. Pet. App. 13a-15a. It held that the deputies had probable cause to arrest Wardlaw for assault because it was reasonable under the circumstances for them to conclude that Wardlaw was about to assault them. *Id.* at 13a-14a. "Pickett's immediate confrontation with Wardlaw did nothing to negate that inference." *Id.* at 14a. Alternatively, the court held that even if in hindsight the officers lacked probable cause, they were protected by qualified immunity because their belief that they had probable cause was objectively reasonable under the circumstances. *Ibid.* The court concluded that, because the absence of probable cause is an essential element of a wrongful prosecution claim, that claim, too, must fail. *Id.* at 15a.

ARGUMENT

1. Petitioner Wardlaw asks this Court to review the court of appeals' application of *Graham* v. *Connor*, 490 U.S. 386 (1989), to the facts of this case. The court of appeals held that the challenged use of force against Wardlaw was reasonable under the circumstances. Wardlaw's disagreement with this fact-bound determination does not warrant further review.

The common-law privilege that Wardlaw asserts could not, even were it incorporated into federal law, affect the reasonable-force determination in the

manner Wardlaw urges.[4] Wardlaw contends that "Marshal Pickett's punching of Mr. Wardlaw * * * was unlawful because under § 72 [of the Restatement (Second) of Torts] he had no privilege to use *any* force against Mr. Wardlaw." Pet. 14 n.12.[5] Wardlaw's privilege and Pickett's corresponding lack of privilege should, in Wardlaw's view, create a rule of strict liability, under which Pickett, as the initial aggressor, is liable if he uses any force whatsoever against Wardlaw while Wardlaw defends an excessive-force victim.

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[4] Wardlaw's assertion of privilege rests chiefly on § 76 of the Restatement (Second) of Torts, which states:

§ 76. Defense of Third Person

The actor is privileged to defend a third person from a harmful or offensive contact or other invasion of his interests of personalty under the same conditions and by the same means as those under and by which he is privileged to defend himself if the actor correctly or reasonably believes that

(a) the circumstances are such as to give the third person a privilege of self-defense, and

(b) his intervention is necessary for the protection of the third person.

1 Restatement of the Law (Second) Torts (2d ed. 1965).

[5] Restatement (Second) of Torts § 72 states:

§ 72. Defense Against Privileged Action

The actor is not privileged to defend himself against any force or confinement which the other is privileged for any purpose to inflict upon the actor except where the other's privilege is based upon a reasonable mistake of fact not caused by the fault of the actor.

1 Restatement of the Law (Second) Torts (2d ed. 1965).

As the court of appeals correctly pointed out, however, the common-law privilege is a shield, not a sword. Pet. App. 9a, 15a. While it may protect Wardlaw from incurring liability for any harm resulting from his reasonable, good-faith effort to help out an individual he reasonably perceives to be in danger, it does not render other people liable where they would not be otherwise. Even assuming Pickett's resistance to Wardlaw's intervention is not privileged, an absence of privilege (*i.e.* common-law immunity from suit) does not in and of itself create liability in Pickett. What the court of appeals found missing was any use of force by Pickett causing him to be liable to Wardlaw under *Graham*'s objective reasonableness standard. Wardlaw's privilege-based attack on the lower court's decision fails to address that deficiency.

The fact-bound nature of Wardlaw's disagreement with the decision below is underscored by his contention that the decision conflicts with *Dixon* v. *Richer*, 922 F.2d 1456 (10th Cir. 1991). *Dixon*, however, applied precisely the same legal standard as did the court of appeals in this case. Petitioner mischaracterizes *Dixon* as "reflect[ing] the consistency between the Fourth Amendment test of objective reasonableness and the common law principle holding an attacker liable to an intervenor who properly aids the attacker's victim." Pet. 17. There was, however, no assertion nor discussion in *Dixon* of any common-law privilege, whether of self-defense, defense of another, or otherwise.[6] The court in that case simply

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[6] *Dixon* was decided after the events at issue in this case. Its holding thus could not conceivably be viewed as creating

applied *Graham*, as did the court of appeals here, but came to a contrary conclusion in the context of a greater use of force.[7]

Wardlaw's suggestion that Pickett's lack of common-law privilege deprives Pickett of qualified immunity is just as untenable as Wardlaw's assertion that his privilege and Pickett's lack thereof created liability. Even assuming, *arguendo*, the existence of a privilege in Wardlaw and the absence of any privilege applying to Pickett, see Brief Amicus Curiae Of Twenty-Nine Tort And Constitutional Law Professors Supporting Petitioner, the court of appeals correctly held that Pickett's qualified immunity under *Harlow* v. *Fitzgerald* does not depend on the existence in each case of an underlying common-law privilege. Pet. App. 11a-13a, 15a.

The theory that qualified immunity should be unavailable for actions that would not be privileged under common law was addressed, and rejected, in *Anderson* v. *Creighton*, 483 U.S. 635 (1987). The Creightons raised a Fourth Amendment challenge under *Bivens* to the FBI's warrantless search of

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clearly established rights of which, under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), repondents should have known.

[7] The officers in *Dixon* stopped a couple to ask whether they knew the whereabouts of a suspect, but when the husband, Willie Dixon, asked why they were stopped, the officers did not inquire about the suspect. Instead they kicked Dixon repeatedly, and as he started to fall, struck him in the stomach with a flashlight, and, when he was on the ground, choked and beat him. 922 F.2d at 1458. When the wife, Hylon Dixon, screamed at the officers not to hurt her husband, they knocked her to the ground, stepped on her and twisted her arm up behind her neck. *Ibid.*

their home. Because officers conducting warrantless searches of innocent third parties' homes in search of fugitives were strictly liable at English common law if no fugitives were present, the Creightons urged that a similar rule be incorporated under *Harlow* to deprive the FBI of qualified immunity. *Id.* at 644.

This Court in *Anderson* was "unwilling to Balkanize the rule of qualified immunity by carving exceptions at the level of detail" urged in that case. 483 U.S. at 646. The Court explained that although *Harlow*'s recognition of qualified immunity is consonant with the common-law tradition,[8] "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Id.* at 645. Rather, the qualified immunity established under *Harlow* embodied a "general principle" to be applied "across the board." *Ibid.*, quoting *Harlow*, 457 U.S. at 815-820. *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Anderson*, 483 U.S. at 645, citing *Harlow*, 457 U.S. at 815-820.

Imbler v. *Pachtman*, 424 U.S. 409 (1976), upon which Wardlaw also relies, is not to the contrary. *Imbler*, like *Dixon*, does not mention or rely in any way on a common-law privilege as a means of creating liability or piercing an immunity defense. Rather, in applying absolute prosecutorial immunity to a prosecutor who knowingly used perjured testimony,

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[8] *Anderson*, 483 U.S. at 644; see *Harlow*, 457 U.S. at 806.

the Court in *Imbler* held that a prosecutor's immunity under federal law is generally supported by the same policy interests underlying the common-law immunities of judges and grand jurors. *Id.* at 422-429. *Imbler* did not hold that an exception should be carved out of the prosecutor's immunity in each instance in which there would be no common-law privilege.

2. The court of appeals' application of the objective reasonableness standards of *Graham* and *Harlow* to Wardlaw's claim against Deputy Marshal Crew for failure to restrain Pickett was also correct. Crew's potential liability for inaction is not even presented in this case in light of the court of appeals' determination that Pickett's use of force against Wardlaw was objectively reasonable. The court of appeals correctly concluded, on the facts as Wardlaw presented them, that "no reasonable jury could conclude that Crew's inaction was such that a reasonable officer could not have thought it lawful." Pet. App. 13a.

The court of appeals did not hold, as Wardlaw suggests it did, that an officer who fails to prevent the use of excessive force is not liable under any circumstances. Pet. 18. The decision below is fully consonant with decisions in other circuits holding officers liable for failing to prevent uses of force where the force was so clearly unlawful that no reasonable officer on the scene could have concluded otherwise. *O'Neill* v. *Krzeminski*, 839 F.2d 9 (2d Cir. 1988) (holding officer not liable for initial beating he observed, but ordering a new trial regarding his failure to prevent further abuse of beating victim); *Fundiller* v. *City of Cooper City*, 777 F.2d 1436, 1441-1442 (11th Cir. 1985) (holding officers liable for failing to intercede while victim of unprovoked police

shooting was subjected to additional mistreatment that exacerbated his wounds); *Webb* v. *Hiykel*, 713 F.2d 405 (8th Cir. 1983) (remanding for consideration whether officer who accompanied other officers found to have used excessive force was liable for failure to prevent it).

3. This case presents no issue of general importance regarding whether Wardlaw's claims of false arrest and malicious prosecution were properly dismissed. Wardlaw contends that probable cause to arrest him could not have existed because he had a common-law privilege to defend Heid from excessive force, and therefore could not have been criminally liable for interceding, and that the deputies should have been aware of that privilege and accordingly not arrested him. Pet. 19-20. The court of appeals correctly held, however, that the deputies could have had probable cause to arrest and charge Wardlaw for assaulting federal officers in violation of 18 U.S.C. 111,[9] even if Wardlaw were privileged. Pet. App. 13a-14a.

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[9] 18 U.S.C. 111 provides in relevant part:

> Assaulting, resisting, or impeding certain officers or employees
>
> (a) IN GENERAL. -Whoever-
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with [specified federal officers, including deputy United States Marshals] while engaged in or on account of the performance of official duties
>
> * * * * *
>
> shall be fined under this title or imprisoned not more than three years, or both.

The court of appeals' decision rests on a fact-specific determination that the privilege, however well established it may have been, was not so clearly applicable to the facts of this case that any reasonable officer in the deputies' position would have known that Wardlaw was privileged. On the contrary, in the circumstances of this case the deputies could have reasonably concluded that Wardlaw appeared on the scene, not as a white knight coming to Heid's rescue, but as an intermeddler who was about to assault them. Pet. App. 14a. Probable cause is a "practical, non-technical conception," *Illinois* v. *Gates*, 462 U.S. 213, 231 (1983), quoting *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949), which law enforcement officers must apply without benefit of hindsight. Even if the officers' belief that they had probable cause to arrest Wardlaw was incorrect, it was not so far wrong that no reasonable officer could have agreed with it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-1377

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIAM C. WARDLAW,

Petitioner,

v.

WILLIAM R. PICKETT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF TWENTY-NINE TORT AND CONSTITUTIONAL LAW PROFESSORS SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Twenty-Nine Tort and Constitutional Law Professors is a group of law professors who teach or have taught tort or constitutional law. The members of this group, desiring to serve the public interest, formed *amicus* for the purpose of urging review of this case. *Amicus* supports the position of the petitioner.

The members of *amicus*, and the law schools at which they teach, are as follows:

Richard Abel, UCLA School of Law
Kathryn Abrams, Cornell Law School
Jane Aiken, University of South Carolina School of Law
Jennifer Arlen, Emory University School of Law
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SUMMARY OF ARGUMENT

Under fundamental and uncontroversial common law, unlawful attackers are liable for striking privileged intervenors who aid the attackers' victims.

ARGUMENT

Liability of unlawful attackers to privileged intervenors who aid the attackers' victims is not controversial. The principles of the *Restatement (Second) of Torts* (1965) which hold the attackers liable, Petition for Writ of Certiorari at 13-14, are part of the fundamental fabric of tort law.

Law on defense of another flows from the law of self-defense. *Id.* The *Restatement* principles holding unlawful attackers liable to victims who reasonably defend themselves are equally fundamental and uncontroversial. We know of no courts or legal scholars who question the accuracy or soundness of the *Restatement* on these basic matters.[1]

While the court below acknowledged the existence of the intervenor's privilege, Pet. App. 6a, it failed to recognize two concommitant principles. Both are fundamental, uncontroversial, and expressly included in the *Restatement*. First, an unlawful aggressor has no privilege to strike a privileged intervenor. *Restatement* § 72. Second, an intentional blow,

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[1] The decision below did not do so. Rather, it ignored, or overlooked, the *Restatement*.

unless privileged, is a battery for which the perpetrator is liable. *Restatement* §§ 10 and 13.

The lower court's failure to recognize these two principles was fundamental error. On the facts before the Court, and under basic precepts of tort law, Deputy Marshal Pickett, the unlawful aggressor, is liable for punching Mr. Wardlaw, the privileged intervenor.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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